

**DECISION**

2836

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-215110

**DATE:** May 24, 1984

**MATTER OF:** The Hygenic Corporation

**DIGEST:**

1. Contracting agency, not GAO, is responsible for determining what product will satisfy the agency's minimum needs.
2. Protest asserting that solicitation should be restrictively drawn is inappropriate for review under GAO's bid protest function, since the protest conflicts with the objective of that function, specifically, to insure the attainment of full and free competition.
3. Government is not required to equalize competitive advantages that foreign firms might have because they are not subject to socio-economic requirements which domestic firms must meet.

The Hygenic Corporation protests the award of a contract to any foreign firms under solicitation No. DLA120-84-B-0813, issued by the Defense Personnel Support Center, Philadelphia, Pennsylvania for endodontic filler. Hygenic contends that the specifications of the solicitation place domestic concerns at a competitive disadvantage and should be revised to restrict competition to firms approved for manufacture of the filler by the Food and Drug Administration (FDA).<sup>1</sup> We dismiss the protest.

The solicitation, as amended, permits the filler to be manufactured by a hand-rolled process. Hygenic alleges this process is an unsanitary and inexpensive manufacturing method, and can only be employed by foreign firms that are not subject to the current good manufacturing practices (CGMP) and site inspection provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. (1982).

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<sup>1</sup>The FDA is authorized to refuse the admission for sale in this country of any drug or device manufactured under unsanitary conditions. 21 U.S.C. § 381 (1982).

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However, it is the responsibility of the contracting agency, not our Office, to determine what products will satisfy the agency's minimum needs. Here, the contracting agency apparently has determined that foreign endodontic filler is acceptable from a health standpoint, and therefore has issued a solicitation that does not restrict competition to domestic firms. The objective of our bid protest function is to insure attainment of full and free competition. In view of that objective, where an agency determines that a less restrictive solicitation will meet the government's needs, we will not consider a complaint that a more restrictive solicitation should be used unless there is a showing of possible fraud or intentional misconduct on the part of procuring officials. See Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD ¶ 417. Since neither fraud nor intentional misconduct has been alleged here, we will not intervene with the agency to require a more restrictive solicitation.

Further, we point out that the exclusion from competition of foreign firms not subject to FDA's CGMP is not consistent with the Buy American Act, 41 U.S.C. § 10a-d (1982). That act does not prohibit the procurement of foreign end products or supplies; rather, it only establishes a preference for domestic items through the use of an evaluation differential that is added to the price of the foreign item. See Concrete Technology, Inc., B-202407, Oct. 27, 1981, 81-2 CPD ¶ 347.

Finally, concerning Hygenic's general allegation of competitive unfairness because of different foreign health standards, we simply note that all foreign manufacturing firms are subject to different legal strictures, including different environmental and health requirements, that may have impacts on manufacturing costs. The alleged bidding unfairness perceived by Hygenic is, in effect, inherent in all competitions that include foreign firms, and, as we have stated previously, there is no requirement that procuring activities equalize whatever advantages foreign firms might have because they are not subject to the same socio-economic requirements that must be met by domestic firms. See E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶ 533.

The protest is dismissed.

*Harry R. Van Cleve*  
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Acting General Counsel